

No. 11,819

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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MOORE DRY DOCK COMPANY and FIREMAN'S  
FUND INDEMNITY COMPANY, a corpora-  
tion,

*Appellants,*

vs.

WARREN H. PILLSBURY, Deputy Commis-  
sioner for the Thirteenth Compensation  
District of the Bureau of Employees'  
Compensation, Federal Security Agency  
and LUELLA G. CAMPBELL, also known as  
LUELLA G. KELLY, alleged widow of  
WILLIAM ANGUS CAMPBELL, deceased,

*Appellees.*

Appeal from the District Court of the United States for the  
Northern District of California, Southern Division.

BRIEF FOR APPELLEE DEPUTY COMMISSIONER PILLSBURY.

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FRANK J. HENNESSY,

United States Attorney,

DANIEL C. DEASY,

Assistant United States Attorney,  
Post Office Building, San Francisco 1, California,

*Proctors for Appellee Pillsbury.*

WARD E. BOOTE,

Chief Counsel

Bureau of Employees' Compensation

Federal Security Agency

HERBERT P. MILLER,

Assistant Chief Counsel

*Of Counsel.*



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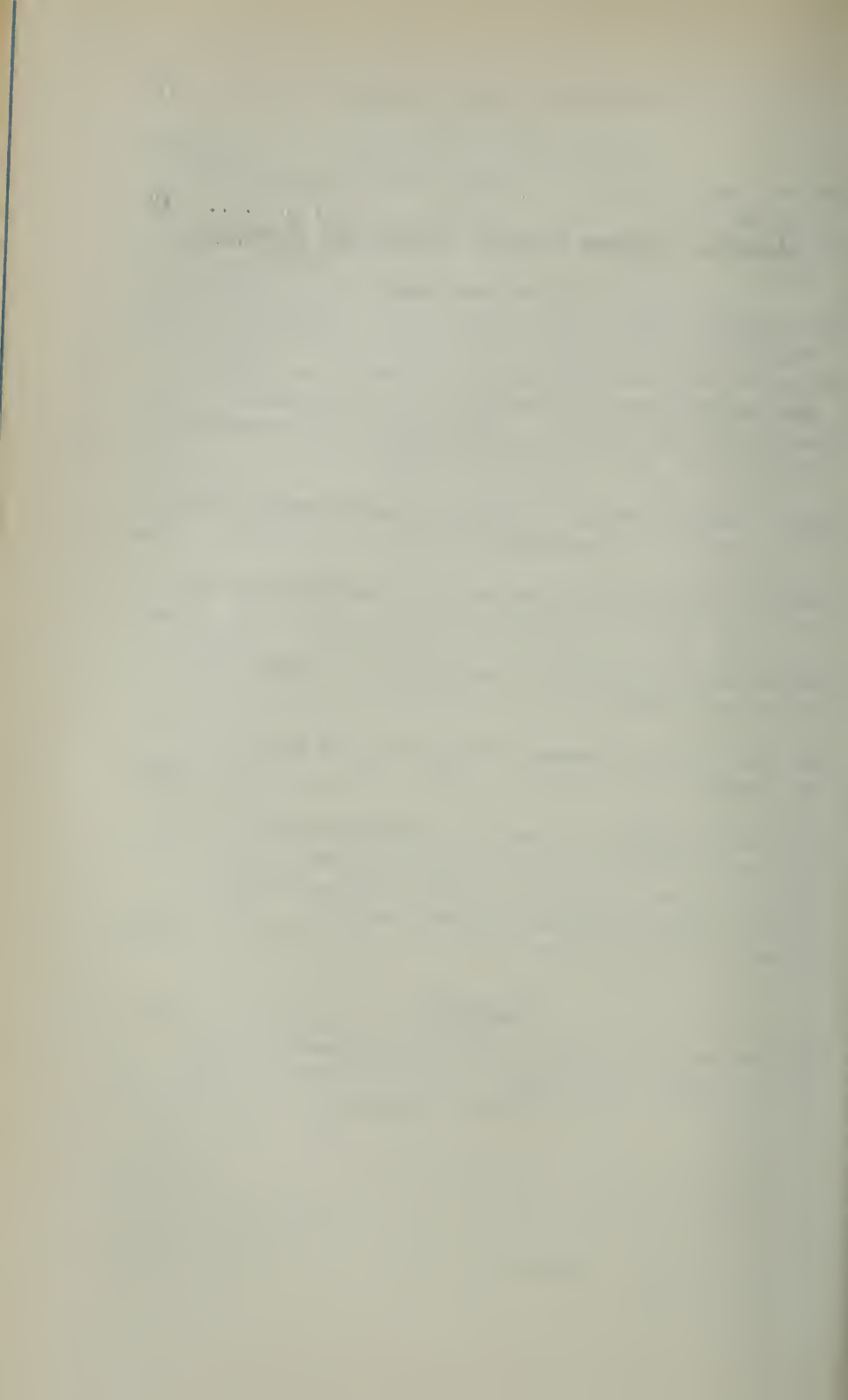
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BRIEF FOR APPELLEE DEPUTY COMMISSIONER PILLSBURY.

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**STATEMENT OF CASE.**

This is an appeal from an order of the United States District Court for the Northern District of California, Southern Division, Honorable George B. Harris, District Judge, confirming a compensation order of the



deputy commissioner filed on December 3, 1946, in which he awarded compensation to Luella G. Campbell, (hereinafter called "claimant"), upon the death of her husband, William Angus Campbell, who sustained fatal injuries on May 12, 1945, in the course of his employment by the appellant Moore Dry Dock Company. The said compensation order was issued by the deputy commissioner pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927 (44 Stat. 1424, U.S.C. Title 33, Chap. 18, sec. 901, *et seq.*). The compensation liability of the employer was insured by the appellant Fireman's Fund Indemnity Company.

The employer and carrier controverted the widow's claim for compensation upon the ground that she was not the widow of the deceased employee within the meaning of the Longshoremen's Act. The deputy commissioner held a hearing on March 18, 1946 (appellants have not included any of the evidence in their printed record on appeal), and upon the evidence adduced at said hearing found that Luella G. Campbell was the widow of the deceased employee and entitled to compensation as such. In the compensation order the deputy commissioner found the facts to be as follows:

"That the claimant herein, Luella G. Campbell also known as Luella G. Kelly, was born December 26th, 1903 and was married to the employee, William Angus Campbell, on February 8th, 1922. The said employee left claimant on or about September 4th, 1923. During the following period of five months he wrote her on



several occasions and thereafter did not communicate with her to the time of his death. He did not after his departure contribute to her support or to the support of their two children; that such conduct constituted desertion of claimant by the said William Angus Campbell. In good faith and believing her husband, William Angus Campbell, to be dead, claimant married one William James Kelly on May 14th, 1938. At said time the said William Angus Campbell was still living. No divorce was ever had between claimant and William Angus Campbell, that therefore claimant was still the wife of William Angus Campbell at the time of his death on May 12th, 1945 and that the said William Angus Campbell was still deserting her at said time''.

The employer and carrier thereupon instituted a proceeding for judicial review of the compensation order pursuant to the provisions of Section 21 (b) of the Longshoremen's Act (33 U.S.C.A. section 921 (b)) alleging in substance that the compensation order was not in accordance with law because the deputy commissioner's finding that Luella G. Campbell was the widow of the deceased employee was not supported by evidence (R. 5).

The court below by order entered on June 25, 1947, sustained the award of the deputy commissioner and it is from said order that this appeal is taken.

## ARGUMENT.

## I.

THE DEPUTY COMMISSIONER'S INFERENCE THAT CLAIMANT  
WAS THE DESERTED WIFE OF THE DECEASED EMPLOYEE  
IS SUPPORTED BY EVIDENCE.

Appellants contend in their brief (pages 4, 5) that the deputy commissioner's findings to the effect "that Campbell's conduct constituted desertion of claimant; that claimant was still the wife of Campbell at the time of his death in 1945, and that he was still deserting her at that time" are "conclusions of law", which the courts have the "duty to review \* \* \* particularly \* \* \* where the facts themselves are undisputed, and it is only the application thereto to the statutory provisions which is in controversy".

This contention of appellants is almost the antithesis of a recent pronouncement of the Supreme Court in the case of *Cardillo, deputy commissioner v. Liberty Mutual Insurance Company*, 330 U. S. 469, 478 (1947) where it stated:

"It matters not that the basic facts from which the Deputy Commissioner draws this inference are undisputed rather than controverted. See *Boehm v. Commissioner*, 326 U. S. 287, 293. It is likewise immaterial that the facts permit the drawing of diverse inferences. The Deputy Commissioner alone is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable, may not be disturbed by a reviewing court. *Del Vecchio v. Bowers, supra*, 287. Moreover, the fact that the inference of the type here made by the Deputy Commissioner involves an application

of a broad statutory term or phrase to a specific set of facts gives rise to no greater scope of judicial review. *Labor Board v. Hearst Publications*, 322 U. S. 111, 131; *Commissioner v. Scottish American Co.*, 323 U. S. 119, 124; *Unemployment Compensation Commission v. Aragon*, 329 U. S. 143, 153-154. Even if such an inference be considered more legal than factual in nature, the reviewing court's function is exhausted when it becomes evident that the Deputy Commissioner's choice has substantial roots in the evidence and is not forbidden by the law. Such is the result of the statutory provision permitting the suspension or setting aside of compensation orders only 'if not in accordance with law'.

"Our attention must therefore be cast upon the inference drawn by the Deputy Commissioner in this case that Ticer's injury and death did arise out of and in the course of his employment. If there is factual and legal support for that conclusion, our task is at an end".

Accord: *Gray v. Powell*, 314 U. S. 402, 412 (1941).

Whether the deceased employee deserted claimant and whether the status of deserted wife continued to the date of death, although the wife innocently (her good faith was also a matter for the deputy commissioner to determine) went through a void marriage ceremony 15 years after the desertion were inferences for the deputy commissioner to draw from the evidence.

To say that there was no factual and legal support for the deputy commissioner's conclusion (inference)

that claimant was the deserted wife of the deceased employee would be to disregard the evidence and the definition of "widow" in the Act itself.

"The term 'widow' includes only the decedent's wife living with or dependent for support upon him at the time of his death; or living apart for justifiable cause or by reason of his desertion at such time".

Since the term "widow" is defined in the Act itself, it is axiomatic that any other definition in any other statute or for any other purpose is of no influence or control. *Weyerhaeuser Timber Co., et al. v. Marshall, deputy commissioner*, 102 F. (2d) 78, 81 (C.C.A. 9, 1939); compare *Baltimore & Ohio R.R. Co. v. Clarke, deputy commissioner*, 59 F. (2d) 595 (C.C.A. 4, 1932); *Middleton v. Luckenbach S. S. Co., Inc., et al.*, 70 F. (2d) 326 (C.C.A. 2, 1934). The definition quoted above gives *four categories* or alternative conditions under which the surviving wife is entitled to compensation—they are:

1. A surviving wife who was living with decedent at the time of his death.
2. A surviving wife (not living with but) who was dependent for support upon decedent at the time of his death.
3. A surviving wife who was living apart from decedent for justifiable cause at the time of his death.
4. A surviving wife who was living apart from decedent by reason of his desertion at the time of his death.



The claimant as the surviving wife in the present case would be entitled to compensation if the conditions of either one of the above categories were fulfilled. (The complaint does not allege, and indeed it would be futile to allege, that claimant was not the 'surviving wife' of the deceased in view of the uncontradicted evidence that she married the deceased on February 8, 1922 and that said marriage had never been dissolved—see exhibit A attached to transcript of testimony before the deputy commissioner. The deputy commissioner found and the evidence supports the finding, that deceased deserted claimant on or about September 4, 1923 and that said desertion continued until the deceased's death (category 4 above).

At the hearing on March 18, 1946 before the deputy commissioner, Exhibit "A" was received in evidence (T. 7). It consisted of an affidavit by the claimant dated February 8, 1946, with attached documents.

It appears from the said affidavit and documents attached thereto that claimant was married to deceased on February 8, 1922; that deceased deserted claimant and their children on or about September 4, 1923; that he wrote to her for five months thereafter on several occasions but not subsequently thereto until his death; that claimant made many inquiries to ascertain deceased's whereabouts but no trace of him was found until his death; that claimant and her children were supported by public aid; that claimant believing deceased to be dead, went through a marriage ceremony with William James Kelly on May 14, 1938, which was 15 years after deceased's desertion.

## II.

## MARRIAGE CEREMONY ENTERED INTO BY CLAIMANT SUBSEQUENT TO THE DESERTION IN BELIEF THAT HER HUSBAND WAS DEAD DID NOT CHANGE HER STATUS.

It is alleged, in effect, in paragraph X of the complaint that the claimant is not entitled to compensation (although admittedly she is the surviving wife who was deserted by the deceased) (a) because she had not been supported by the deceased for more than 20 years before his death, and (b) because of her marriage to William Kelly subsequent to her desertion by the deceased. As to (a) it is obvious, that *it is not necessary that she should have been supported by her husband in order to qualify as widow within the meaning of the Act*, as dependency is not an element of any of the categories or alternative conditions (*supra*) under which a surviving wife is entitled to compensation except category 2, which is not here involved. Category 4 *supra* requires only that the surviving wife *be living apart by reason of the husband's desertion*. As to (b) the sole question remains whether or not the subsequent marriage ceremony which the deserted wife, entered into under the circumstances of the present case, bars her right to compensation.

The prevailing view is that the conduct of the wife, subsequent to the desertion by her husband, such as adultery or invalid marriage, does not of itself defeat her right to compensation for the death of her husband. *Travelers Insurance Co. v. Norton*, deputy commissioner, 34 F. Supp. 740 (Pa. 1940); *Associated Operating Company v. Lowe*, deputy commissioner,

52 F. Supp. 550, affirmed 138 F. (2d) 916 (C.C.A. 2, 1943); *Gilliam v. Southern Ry. Co.*, 93 S.E. 865, 108 S.C. 195 (1917); *Williams v. American Mutual Liability Insurance Company*, 33 S.E. (2d) 451, 72 Ga. App. 205 (1945); *Layman-Calloway Coal Company v. Martin*, 273 S.W. 496, 209 Ky. 690 (1925); *Sims v. American Mutual Liability Insurance Company*, 200 S.E. 164, 59 Ga. App. 170 (1938); *contra Ryan Stevedoring Co., Inc. v. Henderson, deputy commissioner*, 138 F. (2d) 348 (C.C.A. 5, 1943); *American Mutual Liability Ins. Co. v. Henderson, deputy commissioner*, 141 F. (2d) 813 (C.C.A. 5, 1944).

In *Travelers Insurance Co. v. Norton, deputy commissioner, supra*, in upholding an award the court said:

“Plaintiff’s complaint, however, is based upon the following stipulation of facts agreed to by counsel: ‘(1) That the claimant, Pauline Peterson, has lived with a man other than Charles Peterson for the past six years and at the address already appearing of record (276 Carnation Ave., Floral Park, L. I., N.Y.); (2) that during the course of this time, the said Pauline Peterson has held herself out as the wife of the man with whom she has been living; has used his name and has been known in the community as his wife.’ Because of these facts, plaintiff urges that the commissioner’s award should be set aside as contrary to law.

“Section 2(16) of the Longshoremen’s and Harbor Workers’ Compensation Act, 33 U.S.C.A. sec. 902(16) provides that ‘The term “widow” includes only the decedent’s wife living with or



dependent for support upon him at the time of his death; or living apart for justifiable cause or by reason of his desertion at such time'. The commissioner's award was predicated upon the finding that Pauline S. Peterson, *the deceased's lawful wife, at the time of his death was living apart from him for justifiable cause and by reason of his desertion*. Plaintiff, however, would have the statute interpreted so as to bar recovery to a wife who, *because of her own wrongdoing*, was not entitled to support from her husband at the time of his injury, citing for this proposition Polokow Corp. v. Industrial Comm., 336 Ill. 395, 168 N.E. 271. However, the state workmen's compensation law involved therein specifically limited recovery to 'any widow \* \* \* whom he [the deceased employee] was under legal obligations to support at the time of his injury'. Smith-Hurd Ann. St. Ch. 48 sec. 144(a). The desirability of such a statutory provision may readily be conceded. Nevertheless, had Congress intended that such a rule govern awards of compensation under the Longshoremen's and Harbor Workers' Compensation Act, *supra*, it could have stated so explicitly. To read such a provision into an unambiguous statute would exceed the proper bounds of the judicial function. I am unable to concur in the construction of the statute proffered by the plaintiff." (Emphasis supplied).

In *Associated Operating Company v. Lowe*, deputy commissioner, *supra*, the court said:

"Plaintiffs contend that the misconduct of the said defendant deprived her of the right to be considered as the widow of the deceased, and at-

tempts to sustain that contention, by citing cases relating to divorce. The answer to that is, that this case in no way involves a divorce, and such citations are not in point.

*"We are not here dealing with a case under the different compensation laws of the States, but simply with the law in question, which does not provide for inquiry, after abandonment, into the wife's subsequent life and conduct."*

There has been but one case so far, as I have been informed or have ascertained, in the Federal Courts, on the question here involved, and that is directly in point. *Travelers Ins. Co. v. Norton, Deputy Com'r, et al., D. C., 32 F. Supp. 501.*

"In that case the United States District Court, Eastern District of Pennsylvania, sustained the award to the widow, notwithstanding her alleged misconduct.

"In the Peterson case (*Travelers Ins. Co. v. Norton*), the Court, in an opinion reported in D. C., 34 F. Supp. 740, denied a motion for a permanent injunction.

"From these decisions it clearly appears that the finding of the Deputy Commissioner that the individual defendant was the deceased man's lawful wife at the time of his death, and living apart from him for justifiable cause, was a finding of fact supported by substantial evidence, which the Court was bound to accept. It was further held that *the wrong-doing of the wife, after she commenced to live apart for justifiable cause, did not deprive her of the right to compensation as the widow of the deceased, under the Statute here in question.*

“With the reasoning of those opinions I am in entire accord, and I do not find it necessary to repeat that reasoning here.” (Emphasis supplied).

In *Gilliam v. Southern Railway Company, supra*, the court said:

“After having lived with his wife about a year, he abandoned her and his child. There was no evidence that he afterwards contributed anything to the support of either of them; nor was there any evidence that he did not, except as that was inferable from the fact that he had not lived with them or communicated with them. There was evidence that, *after he abandoned her*, his wife lived in the house with another man, and that she had another child. \* \* \* The Evidence did not warrant the Court in upholding as a matter of law, that the wife had forfeited the right to support by her conduct.” (Emphasis supplied.)

In *Layman-Calloway Coal Company v. Martin, supra*, the court said:

“Appellee and the deceased employee were husband and wife. After living together some four or five months as such \* \* \* her husband abandoned her. They lived apart approximately four years before deceased was killed. Some two years after the separation appellee gave birth to an illegitimate child. That fact was held by the Board to operate as a voluntary abandonment by the wife of the husband and because of it the award was refused her.

“\* \* \* So far as this record discloses and it is found by the Board, *the wife was wholly without fault at the time she was abandoned by her hus-*

band; and the fact that they ceased to live together as husband and wife cannot be said to have resulted because she voluntarily abandoned him.

\* \* \*

“\* \* \* *He abandoned her and in so far as the record discloses never offered or gave her the opportunity to resume marital relations. The statute does not provide for inquiry into the wife’s subsequent life and conduct. The sole rule for determining the question here presented, as fixed by the statute, is by inquiry into whether or not the wife had voluntarily abandoned her husband. If the Legislature had seen fit to make the conduct or misconduct of the wife, subsequent to her husband’s abandonment of her, determinative of the question, it might have done so.*” (Emphasis supplied.)

In *Williams v. American Mutual Liability Insurance Company*, *supra*, the court said:

“We think that the principle in this kind of case is analogous to the law of descent and we do not know of any law which bars the right of the wife to inherit from her husband by reason of her adultery or a bigamous marriage.”

In *Sims v. American Mutual Liability Insurance Company*, *supra*, the court said:

“\* \* \* *The evidence shows that the separation was caused by the deceased’s desertion of Bertha Sims through no fault of hers, and there is no evidence that he ever offered to have her return to him. \* \* \* Under the circumstances Bertha Sims was continuously abandoned and it was not possible for her to abandon her husband after she*



*had already been abandoned by him.* Any refusal on her part to go back to him would have been an abandonment, but no such refusal was proved. Compensation should have been awarded to her under the law.” (Emphasis supplied.)

However, assuming *arguendo* that the two decisions in the fifth circuit, *Ryan Stevedoring Co. v. Henderson, supra*, and *American Mutual Liability Ins. Co. v. Henderson, supra*, are correct, namely, that the *misconduct* of the wife subsequent to her desertion by the husband does bar her right to compensation and all the other decisions to the contrary are in error, the instant case does not come within the purview of the two decisions in the fifth circuit for the reason that the wife in the instant case *was not guilty of any misconduct*; the evidence is uncontradicted that she went through a marriage ceremony 15 years after the desertion in the belief that her husband was dead. In the two cases in the fifth circuit, one of the wives cohabited with another man with the full knowledge that her husband was living and in the other case the wife entered a bigamous marriage with like knowledge. However, it is repeated that the decisions in that circuit are in the minority *even under circumstances involving misconduct*.

There is a case under the New York Compensation Law, which appears to be similar to the case at bar in point of fact. In *Van Wyk v. Realty Traders*, 215 App. Div. 254, 213 N.Y.S. 28 (1926), a deserted wife believing her husband to be dead entered into another marriage ceremony. The husband subsequently was

fatally injured in the course of employment. The court upheld an award to her as the widow and said in part:

“*Actual dependency is not a condition to the right of a surviving wife to death benefits under section 16 of the Workmen’s Compensation Law.* \* \* \* The marriage contract between claimant and deceased had not been dissolved at the time of his death. They became husband and wife in the eyes of the law. *Her marriage in the State of Washington was apparently entered into in good faith on the supposition that her first husband was dead* \* \* \*. At common law the remarriage of one having a husband or wife actually living although unheard of for years and believed to be dead is void *ab initio*.” (Emphasis supplied.)

The cases which hold that the subsequent attempted marriage of a wife after desertion does not bar her right to compensation are consistent with the rule that the “marriage between persons one of whom is married to another, although he or she has been deserted by his or her spouse is void, generally by express statutory provision and not merely voidable. It is good for no legal purpose”. 35 Amer. Jur. Sec. 148; *Van Wyk v. Realty Traders*, 213 N.Y.S. 28, 215 App. Div. 254.

## III.

## APPELLANTS' BRIEF.

Appellants state (page 12) that claimant was not "living apart" from her deceased husband at the time of the latter's death because of the fact that she was living with her second "husband". It is difficult to see the connection between the premise and the conclusion and appellants apparently also find similar difficulty for in the next sentence they state that the new relationship became the independent cause of her "*not living with the decedent*" which is another way of saying that she was *living apart* from decedent.

Appellants state in their brief (page 17):

"Likewise, the deputy commissioner failed to make any finding with respect to termination of payments by reason of the second marriage. Sec. 9(b) of the Act provides that the payment to a surviving wife who remarries shall be 'two years compensation in one sum upon remarriage'. The decision of the deputy commissioner completely ignores this provision of the law. Despite the remarriage of the claimant, and the fact that she continues to this very date in her status as Mrs. Kelly, the award makes no provision for a lump sum two-year payment to her. The attention of the court is directed to the fact that Sec. 9(b) of the Act provides that payments to a surviving wife shall continue only 'during widowhood'. It is thus apparent that Congress intended the right to benefits to end upon remarriage. In this case, remarriage was seven years before the death of the decedent, and the period of widowhood had ended before it began".



Claimant's purported marriage to Kelly in 1938 was void *ab initio*. "It was good for no legal purpose". 35 American Jurisprudence, Section 148. It created no legal status. It was neither a marriage nor a "remarriage" within the meaning of Section 9(b) of the Longshoremen's Act (33 U.S.C.A. section 909 (b)) which provides that an award to the surviving wife shall be "during widowhood". To hold otherwise would be to arrive at the absurd conclusion that although claimant's ceremony with Kelly in 1938 was not a marriage which would deprive her of compensation under Section 2 (16) of the Longshoremen's Act as the widow of the deceased employee it was a "remarriage" which would bar her from compensation under Section 9(b) of the Longshoremen's Act which provides that compensation to the surviving wife shall continue "during widowhood"; as appellants aptly state "the widowhood had ended before it began". The words "widowhood" and "remarriage" as used in the Longshoremen's Act refer to a *legal status* and the ceremony in 1938 did not affect claimant's legal status as the widow of the deceased employee.

The case of *Williams v. Lawson*, 35 F. (2d) 346, cited by appellants does not support the contention that the deputy commissioner should have terminated claimant's compensation seven years before it began (see page 18 of appellants' brief). In the cited case the surviving wife contended that she was entitled to compensation under Section 9(b) upon the mere showing that she was the "surviving wife" of the deceased employee; the court however, stated that the direction

in the Act to pay compensation "during widowhood" and the fact that the word "widow" was defined in another section of the Act showed that the "surviving wife" must also come within said definition of "widow" to be entitled to compensation.

It might be added that if appellants have any evidence that claimant has "remarried" since the death of her husband they may apply to the deputy commissioner for a modification of the award "on the ground of a change in conditions" under Section 22 of the Longshoremen's Act (33 U.S.C.A. sec. 922) in which event the deputy commissioner has authority to "terminate, continue, reinstate, increase or decrease such compensation". This point, however, was not raised before the deputy commissioner nor in the court below and hence is not properly before this court. *Parker, deputy commissioner v. Motor Boat Sales, Inc.*, 314 U. S. 244; *Helvering v. Tex-Penn Co.*, 300 U. S. 481, 498 (1937); *Ex parte Keiyo Kamiyama*, 44 F. (2d) 503, 505 (C.C.A. 9, 1930); *Hecht v. Alfaro*, 10 F. (2d) 464, 466 (C.C.A. 9, 1926); *Kortz v. Guardian Life Insurance Co. of America*, 144 F. (2d) 676, 679 (C.C.A. 10, 1944); *Goldie v. Cox*, 130 F. (2d) 695, 715 (C.C.A. 8, 1942); *Reconstruction Finance Corp. v. Sun Lumber Co.*, 126 F. (2d) 731, 738 (C.C.A. 4, 1942); *Ramming Real Estate Co. v. United States*, 122 F. (2d) 892, 893 (C.C.A. 8, 1941); *Atlantic Brewing Co., Inc. v. Wm. J. Brennan Grocery Co.*, 79 F. (2d) 45, 47 (C.C.A. 8, 1935).

## CONCLUSION.

In view of the above it would seem that the finding of the deputy commissioner to the effect that claimant is the widow of the deceased employee "has warrant in the record" and that the compensation order has "a reasonable basis in law". *N.L. R. B. v. Hearst, Inc.*, 322 U. S. 111, 131. The order of the court below sustaining the compensation order was correct and should be affirmed.

Dated, April 5, 1948.

FRANK J. HENNESSY,

United States Attorney,

DANIEL C. DEASY,

Assistant United States Attorney,

*Proctors for Appellee Pillsbury.*

WARD E. BOOTE,

Chief Counsel

Bureau of Employees' Compensation

Federal Security Agency

HERBERT P. MILLER,

Assistant Chief Counsel

*Of Counsel.*

